SILVER CRYSTAL MINES, INC.

IBLA 95-507 Decided January 6, 1999

Appeal from a decision of the Idaho State Office, Bureau of Land Management, declaring mining claims abandoned and void for failure to pay rental fees. IMC 427, IMC 11110, and IMC 11111.

Reversed in part; set aside and remanded in part.

1. Administrative Authority: Generally--Delegation of Authority--Mining Claims: Abandonment--Mining Claims: Contests--Mining Claims: Patent--Mining Claims: Rental or Claim Maintenance Fees: Generally--Secretary of the Interior

   The mere filing of a patent application is not sufficient to exempt a mining claimant from payment of the rental fees required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, Pub. L. No. 102-381, 106 Stat. 1378-79 (1992), for the claims covered by the application, when there is no evidence that the entry had been allowed by the authorized officer before Aug. 31 of the year the payments were due. After Mar. 2, 1993, only the Secretary of the Interior had authority to issue first half final certificates that would allow a mineral entry.

2. Mining Claims: Abandonment--Mining Claims: Rental or Claim Maintenance Fees: Generally--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

   In determining whether a corporation qualified for a small miner exemption from mining claim rental fees required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, Pub. L. No. 102-381, 106 Stat. 1378-79 (1992), and its implementing regulations, neither that statute nor its implementing regulations provide a basis for imputing to the corporation ownership of claims owned by an officer of the corporation as an individual.

APPEARANCES: Joe Swisher, President, Silver Crystal Mines, Inc., Cottonwood, Idaho.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Silver Crystal Mines, Inc. (Silver Crystal), through its President, Joe Swisher, has appealed from a May 5, 1995, decision of the Idaho State Office, Bureau of Land Management, to the extent it declared the Golden Eagle (IMC 427), the Golden Eagle #2 (IMC 11110), and the Golden Eagle #3 (IMC 11111) mining claims abandoned and void. BLM based its decision declaring those three claims and seven others 1/ abandoned and void on its determination that Silver Crystal had not paid rental fees for the 1993 and 1994 assessment years as required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (the Rental Fee Act), Pub. L. No. 102-381, 106 Stat. 1378-79 (1992), and had failed to qualify for an exemption from those fees. BLM also determined that Silver Crystal failed to qualify for a waiver from the maintenance fees required by the Omnibus Budget Reconciliation Act of August 10, 1993 (the Maintenance Fee Act), 30 U.S.C. § 28f (1994), for the 1995 assessment year.

The Rental Fee Act required that each claimant "pay a claim rental fee of $100 to the Secretary of the Interior or his designee on or before August 31, 1993," for each unpatented mining claim, mill or tunnel site to hold such claim for the assessment year ending at noon on September 1, 1993. (Emphasis added.) That Act also contained an identical provision establishing rental fees for the assessment year ending at noon on September 1, 1994, requiring payment of an additional $100 rental fee on or before August 31, 1993. 106 Stat. 1378-79. Congress further mandated that "failure to make the annual payment of the claim rental fee as required by this Act shall conclusively constitute an abandonment of the unpatented mining claim, mill or tunnel site by the claimant * * *." 106 Stat. 1379; see also 43 C.F.R. § 3833.4(a)(2) (1993).

The Rental Fee Act provided for a "small miner exemption" from this rental fee requirement that was available to claimants holding 10 or fewer claims on Federal lands who met all the conditions set forth in 43 C.F.R. § 3833.1-6(a) (1993). Washburn Mining Co., 133 IBLA 294, 296 (1995). The regulations required that a claimant apply for the small miner exemption by filing separate certificates of exemption on or before August 31, 1993, supporting the claimed exemption for each assessment year claimed. 43 C.F.R. § 3833.1-7(d) (1993). No grace period for filing late certificates of exemption was provided by Departmental regulation; those documents must have been received by BLM on or before the date required by regulation. See 43 C.F.R. § 3833.0-5(m); Nannie Edwards, 130 IBLA 59, 62 (1994). This strict filing requirement results from the requirement imposed by

1/ The recordation serial numbers of the other seven claims listed in BLM's decision are IMC 25784, IMC 25786, IMC 25789, IMC 11112, IMC 11115, IMC 111316, and IMC 111317.

Congress that, for every unpatented mining claim, "each claimant shall, except as otherwise provided by this Act, pay a claim rental fee of $100 to the Secretary of the Interior or his designee on or before August 31, 1993." 106 Stat. 1378.

On August 30, 1993, Joe Swisher as President of Silver Crystal filed exemption certificates for the 1993 and 1994 assessment years listing the 10 claims that BLM declared abandoned and void in its decision. Although BLM did not find that Silver Crystal itself owned more than 10 claims, BLM determined that Silver Crystal failed to qualify for the exemption on August 31, 1993, because Swisher also filed an exemption for 10 claims as Vice President of Idaho Non-Metallic Mines, that he was President of Idaho Mining and Development, which owned approximately 1,322 claims, and because his wife, Barbara Swisher, had filed an exemption for 10 additional claims.

[1] The three claims listed in the Notice of Appeal are ones for which Silver Crystal filed a patent application (IDI 28539) on June 26, 1991, and Swisher asserts that these claims should be exempt from the rental fee requirement. Under 43 C.F.R. § 3833.1-7(f) (1993), mining claims for which an application for a mineral patent has been filed were exempt from the payment of rental fees for the assessment years during which assessment work was not required pursuant to 43 C.F.R. § 3851.5 (1993) if "the mineral entry has been allowed by the authorized officer pursuant to 30 U.S.C. 29 and § 3862.4-6 and 3862.5 of this title." Regulations implementing the Maintenance Fee Act likewise excused payment of the maintenance fee for "mining claims for which an application for mineral patent has been filed, and the mineral entry has been allowed." 43 C.F.R. § 3833.1-6(f) (1994).

In Jack J. Swain, Sr., 142 IBLA 122, 125 (1998), we noted that the mere filing of a patent application was not sufficient to exempt the claims from payment of the rental fee, but that "entry" had to be "allowed by the authorized officer" pursuant to the cited statutory and regulatory provisions. In Hugh D. Guthrie, 145 IBLA 149, 152 (1998), we reached the same conclusion with respect to the maintenance fee.

According to BLM Manual H-3860-1, Processing of Mineral Patent Applications, Chapter VI, First Half--Mineral Entry Final Certificate, A. Allowance of Mineral Entry 1. Completion of First Half (Rel. 3-265, April 17, 1991): "Completion of the 'first half' of the mineral entry final certificate confirms that mineral entry has been allowed." The BLM Manual 3860, Glossary 4 (Rel. 3-266, July 9, 1991), explains:

> [F]inal certificate: Bureau form 1860-1, Mineral Entry Final Certificate (FC). The final certificate has two halves, each of which serves a purpose in the patent process. At the conclusion of the publication process, after receipt of the publisher's affidavit, receipt of the final proofs, and acceptance of the purchase price, the authorized officer causes the first half of

> the final certificate to be completed. The information includes the authority for the type of claims being patented, the names and numbers of the claims in the application, the legal description of the land, and any exceptions of land or claims from the application.
>
> Issuance of the first half of the final certificate grants equitable title to the applicant, relieves the applicant of the requirement to perform assessment work, and segregates the land from all forms of entry and appropriation under the public land and mineral laws.
>
> The second half of the final certificate is completed after the mineral examination report is written and approved and the mining claims are clearlisted for patent. The second half becomes the master plat for the patent itself. It contains the names and descriptions of the claims cleared for patent and any reservations required by law to be included in the patent.

Thus, allowance of a mineral entry is evidenced by the issuance of the first half final certificate (FHFC). See Jerry D. Grover, 139 IBLA 178, 179-80 (1997). Secretarial Order 3163 (March 2, 1993) revoked the authority of subordinate officials to issue FHFC's and patents under the mining law and reserved that power to the Secretary himself. Thus, since March 2, 1993, the "authorized officer" under 43 C.F.R. § 3833.1-7(f) (1993) and 43 C.F.R. § 3833.1-6(f) (1994) has been the Secretary. See 209 Departmental Manual 7.2. Although the case record contains a FHFC prepared for the signature of the Secretary of the Interior, indicating that Silver Crystal tendered the purchase price for the claims on November 1, 1993, after the August 31, 1993, deadline for payment of the fees, the Secretary did not sign that certificate.

On May 8, 1995, Appellant filed with the Board a document captioned "Petition for Order Granting Mineral Patent and Estoppel Prohibiting the Bureau of Land Management from Continued Acts of Harassment and Improper Use of Mining Laws to Prevent the Patent for Golden Eagle, Golden Eagle #2, Golden Eagle #3 Lode Mining Claims." The Secretary has reserved to himself the power to issue FHFC's. Therefore, the failure to issue the FHFC is not an issue within our purview.

We now consider whether BLM properly determined that Silver Crystal did not qualify for an exemption of rental fees. In doing so, we note that the Rental Fee Act contains only the following provision for aggregating claims of nominally different owners in determining eligibility for the small miner exemption:

> [F]or the purposes of determining eligibility for the exemption from the claim rental fee required by this Act, any claims held

> by a husband and wife, either jointly or individually, or their children under the age of discretion, shall be counted together toward the ten claim limit.

106 Stat. 1379. Nothing in the text of the statute suggests that claims owned by a corporation would be added to those of an individual in determining whether the individual would be eligible to obtain an exemption. Likewise, nothing suggests that a corporation owning 10 or fewer claims would become ineligible by adding to its claims those owned individually by its shareholders or officers.

Nevertheless, by regulation BLM provided that "[m]ining claims held in co-ownership, or by an association of locators, by a partnership, or by a corporation shall be counted toward the 10-claim limit for claimants that have an interest in these entities." (Emphasis added.) 43 C.F.R. § 3833.1-6(a)(3) (1993). When BLM published this regulation, it responded to comments that focused on the extent to which a corporation's claims could be counted toward the 10-claim limit for individuals who might have an interest in the corporation, but nevertheless stated: "[T]he legal corporation and the individual are separate entities under this section and are separately eligible for the small miner exemption." 58 Fed. Reg. 38190 (July 15, 1993).

In a recent en banc decision, 3MRC-Co. Inc., 146 IBLA 6 (1998), the Board considered the circumstances under which a corporation's claims could be attributed to an individual for the purpose of determining the individual's qualification for the waiver, and a plurality concluded: "[I]t appears BLM intended that a corporation could hold 10 or fewer claims and an individual stockholder of that corporation could hold 10 or fewer claims and both could qualify for an exemption so long as the individual stockholder did not 'control' the corporation. Id. at 10." In that case, two corporate officers, the vice president and the secretary, filed exemption certificates for claims they separately owned as individuals. The Board concluded that there was a rebuttable presumption that those corporate officers had "control" of the corporation, and held that each officer had to add all of the corporation's claims to his own in determining his eligibility for the exemption. Id. at 11. However, the Board reversed BLM's decision denying the small miner exemption for the corporation's claims. Although the lead opinion was signed only by a plurality of judges, the reversal of BLM's decision on the corporation's eligibility was a result that was supported by all 12 members of the Board.

[2] A textual analysis of the regulation makes it clear that it provides no basis for disqualifying Silver Crystal on the basis of claims that Joe Swisher may own. For the purposes of applying the regulation in this case, the claimant is Silver Crystal, not Joe Swisher. Under the regulation, claims held by other persons or entities "shall be counted toward [Silver Crystal's] 10-claim limit" only if Silver Crystal "ha[s] an interest in these entities." Although Silver Crystal's President may have had

an interest in other corporations that owned mining claims, nothing in the text of the Act or regulations provides a basis for imputing ownership to Silver Crystal of claims owned by Swisher as an individual. To the extent that BLM determined that Silver Crystal "had an interest in" Joe Swisher and, therefore, was not eligible for the small miner exemption on the basis of other claims in which Joe Swisher or his wife Barbara were believed to hold an interest, BLM's decision must be reversed.

We now consider whether BLM properly determined that Silver Crystal was ineligible for a waiver of the fees required by the Maintenance Fee Act on August 31, 1994. Like the Rental Fee Act, the Maintenance Fee Act required the holder of an unpatented mining claim, mill site, or tunnel site to pay a claim maintenance fee of $100 per claim on or before August 31 of each year for the years 1994 through 1998. 30 U.S.C. § 28f(a) (1994). Under 30 U.S.C. § 28i (1994), failure to pay the claim maintenance fee "shall conclusively constitute a forfeiture of the unpatented mining claim, mill or tunnel site by the claimant and the claim shall be deemed null and void by operation of law."

The Maintenance Fee Act gave the Secretary discretionary authority to waive the fee for a small miner who holds not more than 10 mining claims, mill sites, or tunnel sites, or combination thereof, on public lands and has performed assessment work required under the Mining Law of 1872. 30 U.S.C. § 28f(d)(1) (1994). Although the Maintenance Fee Act generally continued the requirement to pay an annual per claim fee of $100, it authorized a waiver of the fee for small miners under terms significantly different from those in the Rental Fee Act. See Patrick M. Layman (On Reconsideration), 144 IBLA 367, 369 (1998) (Maintenance Fee Act eliminated several of the Rental Fee Act's requirements for obtaining a small miner waiver); Alamo Ranch Co., 135 IBLA 61, 73 (1996) (rental fee exemption for small miners was established by statute, but maintenance fee waiver was a matter of discretion with the Secretary).

One change that is important for the disposition of this appeal is the provision requiring the claimant seeking a waiver to certify that "the claimant and all related parties * * * held not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands." 30 U.S.C. § 28(d)(1) (1994); accord, 43 C.F.R. § 3833.1-6(a)(1) (emphasis added). A "related party" is defined as "(A) the spouse and dependent children (as defined in section 152 of Title 26), of the claimant; and (B) a person who controls, is controlled by, or under common control with the claimant." 30 U.S.C. § 28(d)(2) (1994); accord, 43 C.F.R. § 3833.0-5(x) (emphasis added). "[T]he term control includes actual control, legal control, and the power to exercise control, through or by common directors, officers, stockholders, voting trust, or a holding company or investment company, or any other means." Id.; accord, 43 C.F.R. § 3833.0-5(y). In Richard W. Cahoon Family Limited Partnership, 139 IBLA 323, 326 (1997), we noted that the term "related parties" may include a general partner who can exercise "control" or limited partners who are "under common control with"

a person who holds the right to transfer the claim. Similarly, Joe Swisher as President of Silver Crystal would be a "related" party as would other corporations of which Swisher is an officer.

Nevertheless, the present record does not provide a sufficient basis on which to affirm BLM. The issue is whether Silver Crystal was eligible for a waiver of maintenance fees on August 31, 1994. To the extent BLM considered in its decision whether Silver Crystal was eligible for a waiver from the maintenance fees, it referenced Joe Swisher's relationship with Idaho Non-Metallic Minerals, Inc., Idaho Mining and Development Company, and Silver Crystal, and concluded that it was not. However, that determination must be reexamined in light of fact that the Rental Fee Act provided that "failure to make the annual payment of the claim rental fee as required by this Act shall conclusively constitute an abandonment of the unpatented mining claim, mill or tunnel site by the claimant." 106 Stat. 1379. Thus, many of the claims that BLM considered to be disqualifying for Silver Crystal were void as of August 31, 1993. BLM must determine Silver Crystal's eligibility for a waiver of the maintenance fees as of August 31, 1994, based on the status of any claims attributable to Silver Crystal on that date.

BLM's decision must be set aside to the extent it denied Silver Crystal's waiver certification as to the three claims in question. In addition, the other seven claims addressed in that decision must be considered abandoned and void as of August 31, 1993, because no appeal relating to those claims was taken by Silver Crystal, and those claims would not be counted in determining Silver Crystal's eligibility for a waiver of the maintenance fee as of August 31, 1994.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed in part and set aside in part and the case remanded for BLM to determine Silver Crystal's eligibility for a waiver of the maintenance fee as of August 31, 1994.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge